No. 91-1721

Supreme Court, U.S.
FILED
JAN 15 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an association has satisfied the injury in fact element of standing for purposes of challenging a set-aside ordinance where it has failed to allege that one or more of its members have been or will be deprived of particular bidding opportunities for which they would otherwise be eligible.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a vital interest in legal issues that affect the powers, responsibilities, and liabilities of state and local governments.

Petitioner seeks to challenge a city program without even attempting to satisfy the first requirement of standing—the allegation of an "injury in fact." Under this Court's cases, a plaintiff must, in order to establish standing, allege a concrete and particularized injury that is actual or imminent. The unacceptable alternative, as this case graphically illustrates, is to transform the federal courts into forums for airing " 'generalized grievances' about the conduct of Government." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974) (citation omitted). The result, of course, would be the subversion of the structure and functioning of government.

State and local governments should not be subjected to such victimless, political litigation. Litigation brought in the absence of identified injury diverts funds from already strapped state and local budgets, and entangles state and local governments and the courts in adjudication of political disputes brought by advocacy groups. Such challenges may concern a wide variety of highly charged substantive issues, as is indicated by the array of *amici* supporting petitioner.

Because of the importance of the issues presented to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

A. The Ordinance at Issue

At issue in this case is the standing of AGC to challenge, on equal protection grounds, the City of Jacksonville's Minority Business Enterprise Participation Programs. City of Jacksonville, Fla. Purchasing Code §§ 126.601-126.611 (1984), Pet. App. 14-27 ("the ordinance").[2]

[1] The parties' letters of consent, pursuant to Rule 37 of the Rules of the Court, have been filed with the Clerk.

The ordinance earmarked 10% of City contracting funds for minority owned business ("MBE") contracting opportunities. City Code § 126.604(a), Pet. App. 15-16. It did not, however, automatically "set aside" any specific number or percentage of municipal contracts for MBE bidding only. Instead, the ordinance set up a discretionary framework for achieving its goals. The ordinance directed the Chief Purchasing Officer ("CPO") of the City, in consultation with the Director of Public Works and representatives of each division of City government, to ascertain annually what amounts of money were to be spent under the ordinance. City Code § 126.604(b), Pet. App. 17. Once the dollar amount of the set-aside was determined, the CPO and other government officials were required to determine which projects were reserved for MBE's. They were directed to "endeavor to include projects representative of the total number of projects which will be constructed or undertaken and the types of trades which will be utilized durng the fiscal year." City Code § 126.604 (b)(1), Pet. App. 17.

The ordinance provided that, throughout this process, "mathematical certainty is not required", City Code § 126.605(a)(4), Pet. App. 19, and specifically allowed the CPO to 'waive the percentage set-aside . . . or reduce the percentage to a definite amount less than

[2] On October 27, 1992, the ordinance was repealed. *See* Respondents' Motion to Dismiss at 2-3.

the ten percent" based upon consideration of the following factors:

> (a) the total dollar amount of the proposed set aside;
>
> (b) the extent to which the type or types of contracts involved may be reasonably susceptible to separate contracting of portions of work, services, goods, supplies and the like;
>
> (c) the particular type or types of work, services, goods, supplies and the like which are involved in the set aside;
>
> (d) the availability of minority business enterprises in the particular contracting specialties, areas or fields involved in the set aside; and
>
> (e) the additional cost to the City of securing the specified percentage of minority business enterprise participation.

City Code § 126.608, Pet. App. 24.

If projects were exempted on any of the foregoing bases, the dollar amount was *subtracted* from the overall goal. *Id.* Hence, petitioner admits that under the ordinance, "depending upon the availability of minority businesses[,] the percentage of set-aside work for MBE's can vary from 0% to 10%." R., docket entry 10/20/89, Plaintiff's Statement of Material Facts As To Which There Exists No Genuine Issue ¶ 24 at p. 8.

Both the amount of the set-aside, and the listing of specific contracts, were subject to review and revision by the Mayor. Changes occurring in the set-aside program during the fiscal year had to be reported to the CPO on a quarterly basis, and alterations had to be approved by the Mayor. City Code § 126.610, Pet. App. 25.

B. History of the Case

Petitioner brought an action for injunctive relief under 42 U.S.C. § 1983. Petitioner's allegations of harm included the following:

> 46. Numerous non-minority members of Plaintiff AGC would have been eligible to, and would have, bid on such designated set aside contracts but for the restrictions imposed on such contracts by the Defendants . . . .
>
> 48. Numerous non-minority members of Plaintiff have been damaged economically by being required to discriminate in the award of subcontracts so as to satisfy the 10% minority participation requirement.
>
> 49. Numerous non-minority members of Plaintiff AGC have been damaged by such actions of the Defendants because they have ben [sic] deprived of substantial economic and business opportunities by being precluded from bidding on and performing subcontracts for persons holding construction contracts who have been required to award such subcontracts to MBE's.

J.A. 18-19.[3]

The district court issued a preliminary injunction against the operation of the ordinance. J.A. 35. The court of appeals reversed because of AGC's failure to demonstrate irreparable injury. J.A. 40. In support of its holding, the court of appeals expressly noted

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[3] While AGC's complaint alleged that "all contractors awarded City . . . construction contracts must subcontract at least ten percent (10%) of such contracts to MBEs," J.A. 19, the sole provision of the ordinance dealing with subcontracting applies only to "[a] minority business enterprise that is awarded a contract under this part." Pet. App. 23.

that "[t]he plaintiff association failed to bring forth representatives who could assert injury from the set-aside program." J.A. 39. Concurring specially, Chief Judge Tjoflat likewise concluded that "plaintiff did not fulfill its responsibility of establishing the standing of its individual members and therefore lacks representative standing to litigate its members' claims." J.A. 42-43. (Tjoflat, C.J., concurring).

On remand petitioner "filed no additional material but relied upon the record that had been presented . . . on appeal." J.A. 2. The district court granted AGC's motion for summary judgment and entered a permanent injunction against the City.

The court of appeals reversed, holding that petitioner lacked standing. The court reasoned that petitioner's allegations were insufficient to satisfy the constitutional requirement of injury in fact to one of its members. Pet. App. 5.

SUMMARY OF ARGUMENT

1. To give effect to Article III's limitation of the federal judicial power to actual cases and controversies, a plaintiff invoking the jurisdiction of the federal courts bears the burden of establishing its standing to sue, that is, "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). This case centers on whether petitioner has established the "injury in fact" element of standing. As the Court has repeatedly emphasized, that injury "must be concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Accordingly, the injury must be "concrete and particularized," *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992), and not "merely 'abstract.'" *Whitmore*, 495 U.S. at 155 (citation omitted). Moreover, the "alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citation omitted).

2. Petitioner's allegations of injury are deficient in both respects. In the qualitative sense, petitioner's broad based challenge to Jacksonville's set-aside ordinance lacks the specificity necessary for a federal court to ensure that it is not invalidating Jacksonville's set-aside program in the absence of any injury. Moreover, this Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), did not create a *per se* rule that racial or gender based set-asides violate the Equal Protection Clause. To the contrary, Jacksonville can adopt a set-aside program so long as it is narrowly tailored to redress identified discrimination. 488 U.S. at 509. Because Jacksonville's ordinance covers numerous trades, even if the ordinance were unconstitutional with respect to one trade, it might be constitutional when applied to other trades. The failure of petitioner to identify with particularity the trades its members engage in, let alone the specific bidding opportunities which were set aside within those trades, thus leaves the federal courts without "a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

3. Petitioner's allegations of injury are also deficient because the alleged harm is too " 'conjectural' or 'hypothetical.'" *Whitmore*, 495 U.S. at 155 (cita-

tions omitted). As the Court has recognized, petitioner's injury must be either "actual or imminent," *id.* at 155; "[a]llegations of possible future injury do not satisfy the requirements of Art. III." *Id.* at 158. Petitioner points to no situation in which any member was denied a bidding opportunity on account of race or sex. Indeed, petitioner has failed to allege any instance in which the city's officials have stated their intention to set aside any contract that would deprive a member of a bidding opportunity within that member's particular trade. The Court should thus decline petitioner's invitation to enter " 'into the area of speculation and conjecture' . . . and [go] beyond the bounds of its jurisdiction." *Id.* (citation omitted).

ARGUMENT

PETITIONER HAS FAILED TO SATISFY THE INJURY IN FACT ELEMENT NECESSARY TO ESTABLISH STANDING

A. Injury in Fact Is a Constitutional Prerequisite to Suit

As the Court has repeatedly recognized, "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.' " *See, e.g., Allen v. Wright*, 468 U.S. 737, 750 (1984). This doctrine, "founded in concern about the proper—and properly limited—role of the courts in a democratic society," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), states a "fundamental limit[] on federal judicial power in our system of government."[4] *Allen*, 468

[4] As the Court has recognized, "the law of Art. III standing is built on a single basic idea—the idea of separation of

U.S. at 750. Hence, Article III's limitation on the judicial power is "not merely a troublesome burden to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is part of the basic charter promulgated by the Framers of the Constitution." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 476 (1982).[5] The federal courts simply do not exist to resolve every grievance a party may have with the operation of government. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *Schlesinger v. Reservists Committee To Stop The War*, 418 U.S. 208, 217 (1974).

A party thus may not pursue a grievance in the federal courts unless it establishes its standing to sue, that is, "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. Moreover, it is the burden of the party invoking the jurisdiction of the federal courts to establish these elements. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

This case centers on whether petitioner's complaint establishes but one of the core elements of the standing inquiry, the "injury in fact" element. *See id.* "That injury," as the Court has "emphasized repeat-

powers." *Allen*, 468 U.S at 752. *See also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983).

[5] *See also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260-61 (1977); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

edly must be concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In the qualitative sense, the injury must be "concrete and particularized," *Lujan*, 112 S.Ct. at 2136, and not "merely 'abstract.'" *Whitmore*, 495 U.S. at 155 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). And in the temporal sense, the "alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (quoting *City of Los Angeles v. Lyons*, 461 U.S. at 101-02); *see also Lujan*, 112 S.Ct. at 2136.

The Court has steadfastly adhered to these principles in a variety of cases involving claims of racial discrimination. For example, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the plaintiff was an African American who was denied service by a club's dining room while attending as the guest of a member. Plaintiff challenged both the club's racially exclusionary membership policy and its failure to serve him under the Equal Protection Clause of the Fourteenth Amendment. The Court rejected plaintiff's challenge to the club's membership policy for lack of standing, holding that he "was not injured by Moose Lodge's membership policy since he never sought to become a member." 407 U.S. at 167. The Court held, however, that plaintiff had standing to challenge the club's failure to serve him. *Id.* at 168.

In *O'Shea v. Littleton*, 414 U.S. 488 (1974), a class largely comprised of African American civil rights workers alleged that various officials "'have denied and continue to deny to plaintiffs and members of their class their constitutional rights' by illegal bond-setting, sentencing, and jury-fee practices." 414 U.S. at 495. The Court dismissed the complaint, reasoning that because "the prospect of future injury

rests on the likelihood that respondents will again be arrested . . . and will again be subjected to bond proceedings, trial, or sentencing" before the defendant officials, the injury involved "speculation and conjecture." *Id.* at 496-97.

In *Allen*, parents of black public school students alleged that the Internal Revenue Service had failed to adopt adequate standards and procedures to enforce its policy of denying tax exempt status to racially discriminatory private schools. 468 U.S. at 740. The parents, however, did not allege that their children had been denied admission by any of the schools. *Id.* at 746. Indeed, as the Court noted, the parents never alleged "that their children have ever applied or would ever apply to any private school." *Id.* Instead, the parents alleged, *inter alia*, "a direct injury from the mere fact of the challenged Government conduct." *Id.*

The Court, despite interpreting the alleged injury as "a claim simply to have the Government avoid the violation of law alleged in respondent's complaint" and, alternatively, as "a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the government discriminates on the basis of race," held both grounds insufficient to confer standing. 468 U.S. at 753-756. With regard to the first ground, the Court held that "an asserted right to have the Government act in accordance with law is not sufficient" to confer standing. *Id.* at 754. With regard to the second ground, the Court, while noting the seriousness of such stigmatic injuries, nevertheless rejected it as too abstract to be judicially cognizable because it was not "suffered as a direct result of having personally been denied equal treatment." *Id.* at 755-56.

These constitutional principles are not subject to modification or dilution where discrimination against a non-minority group is alleged. For example, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a case involving a non-minority plaintiff, contains reasoning wholly consistent with these well-settled principles of standing.

To be sure, petitioner is correct that the standards articulated in *Bakke* do not require it to allege that its members would have received a particular contract, but rather only that they have received unequal treatment. *See* Pet. Br. at 15-16, 25. *Bakke*, however, does not support petitioner's position that its complaint sufficiently alleges injury. In contrast to petitioner, Bakke's injury was distinct and palpable. Having applied to and been rejected by the university's medical school, Bakke had at least identified how he had been " 'personally denied equal treatment' by the challenged discriminatory conduct" and therefore had standing to challenge the medical school's admissions program. *Allen*, 468 U.S. at 753 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)). It is clear, however, that Bakke would not have had standing to mount a challenge to the minority admissions programs of those schools of the university to which he did not apply. *See Allen*, 468 U.S. at 746.

Petitioner mounts exactly the type of broad based challenge which this Court's clear precedents make untenable. Petitioner's complaint does not identify the particular trades its members engage in, or any particular contract its members would have bid on. *See* J.A. 10-11, 18-19. But as the Court recognized in *City of Richmond v. Croson*, 488 U.S. 469 (1989), construction contracts involve a variety of "particular service[s]."

Because petitioner's complaint fails to identify the particular trades its members engage in, let alone any bidding opportunities set aside within those trades, to hold that it has standing would result in needless litigation over the validity of the city's program when none of petitioner's members have been injured. And even if one of petitioner's members has been injured, there remains a very high possibility that portions of the city's program which do not injure any of petitioner's members will needlessly be subjected to judicial scrutiny. The failure of petitioner to identify with particularity the trades its members engage in or the bidding opportunities of which they were deprived thus leaves the federal courts without "a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. Absent this showing, petitioner has not sufficiently alleged an "actual or threatened injury" and the "exercise of federal jurisdiction 'would be gratuitous and thus inconsistent with the Art. III limitation.' " *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (citation omitted).

B. Petitioner Has Failed to Allege That Its Members Suffered Injury In Fact

1. *The Injury Alleged By Petitioner Is Not One Which Is Judicially Cognizable Given the Parameters Set Forth in* Croson

It is axiomatic that petitioner's injury must be to "a legally protected interest." *Lujan*, 112 S.Ct. at 2136. While "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). As the Court has recognized, "[t]he actual or threatened injury required by Article III may exist solely by virtue of [the provi-

sion] 'creating legal rights.'" *Id.* (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). Accordingly, in order to determine whether petitioner has alleged an injury sufficient to confer standing, an examination of the nature and source of its claim is necessary.

A mere assertion of a classification based on race is insufficient, in itself, to confer standing. This Court has repeatedly declined to hold that the Constitution requires absolute color-blindness. *See, e.g., Bakke*, 438 U.S. at 355-56 ("the position that . . . '[o]ur Constitution is color-blind' has never been adopted by this Court as the proper meaning of the Equal Protection Clause"). In *Croson*, the Court provided specific guidance as to the nature of the legal interests implicated in the contract set-aside context.

In *Croson*, the Court addressed whether a municipal contracting ordinance violated the Equal Protection Clause of the Fourteenth Amendment because it set aside a percentage of the contracts for minority business enterprises (MBEs). While the Court invalidated the Richmond ordinance, it did not create a *per se* rule that racial or gender based set-asides are unconstitutional. As the plurality stated:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond has evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors *willing or able to perform a particular service* and the number of such contractors actually engaged by

> the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. In the extreme case, *some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.*

Croson, 488 U.S. at 509 (citations omitted) (emphasis added). *Croson* thus makes clear two points significant in analyzing the nature of the injury which petitioner has alleged. First, a municipality may enact a set-aside provision so long as it is narrowly tailored and redresses identified discrimination. *Id.* The corollary of this proposition is that when a municipality satisfies *Croson*, the Equal Protection Clause has not been violated and a plaintiff cannot prove an injury of constitutional dimension. Accordingly, a plaintiff alleges injury only when it alleges that bidding opportunities in the particular trade it engages in have been restricted in violation of *Croson*. Second, while it may be that the application of the strict scrutiny required by *Croson* will frequently result in the invalidation of a set-aside ordinance, that cannot be used as an excuse to disregard the application of the same standing requirements imposed in other cases. Jacksonville's contracting ordinance covers numerous trades. While it may well be the case that the ordinance is unconstitutional as applied to a "particular service" (488 U.S. at 509) or trade such as bricklayers, it may also be the case that the ordinance, when applied to plumbers or electricians, for example, is constitutional.

In order to satisfy Article III's case or controversy requirement then, the Court must require a plain-

tiff challenging the program to allege which particular aspects of the program have caused it injury. The Court cannot allow a plaintiff to mount the type of hypothetical global challenge to every aspect of the program such as petitioner did here. *Cf. Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Not only is such a challenge extremely burdensome to defend, it needlessly results in the socially divisive and destructive process of reexamining a locality's past history of racial discrimination. Here, in contrast to *Croson* where the contractor identified a particular service (and contract) subject to the set aside, *see* 488 U.S. at 481, petitioner provides no similar level of specificity but rather rests on a blanket allegation which fails to identify with particularity the trades its members engage in. And petitioner's complaint does not even give Jacksonville fair notice as to which aspects of its program it must defend. *See* Fed. R. Civ. P. 8. Petitioner's blanket allegations are not enough to transform this dispute from a " 'generalized grievance[]' about the conduct of Government," *Schlesinger*, 418 U.S. at 217, into a judicially cognizable case or controversy.

2. *Petitioner's Alleged Injury Is Too Speculative To Confer Standing*

Petitioner's injury must also be concrete in the "temporal sense." *See, e.g., Whitmore*, 495 U.S. at 155. In this sense, the "alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.' " *Id.* (quoting *Lyons*, 461 U.S. at 101-02); *see also Lujan*, 112 S.Ct. at 2136; *O'Shea*, 414 U.S. at 497.

In *Whitmore*, petitioner, a death row inmate, sought review of a death sentence imposed on Simmons, a fellow inmate. 495 U.S. at 156. Petitioner's allegation of injury was premised on the State's system of comparative review of death penalty cases; petitioner thus

alleged that he had "a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be arbitrarily skewed by the omission of any capital case." *Id.* at 156 (citation omitted). Whitmore's theory was "that he might in the future obtain federal habeas corpus relief that would entitle him to a new trial. If, in that new trial, Whitmore [was] again convicted and sentenced to death, he would once more seek review of the sentence by the Supreme Court of Arkansas" and "that court would compare Whitmore's case with other capital cases to insure that the death penalty is not . . . arbitrarily applied." *Id.* at 156-57. Thus, according to Whitmore, he would be injured "because the heinous crimes committed by Simmons would not be included in the data base employed for Whitmore's comparative review." *Id.* at 157.

The Court held Whitmore's injury to be "too speculative to invoke the jurisdiction of an Art. III court." *Id.* Not only was it problematic whether Whitmore would ever receive habeas relief, it was "nothing more than conjecture that the addition of Simmons' crimes to a comparative review 'data base' would lead the Supreme Court of Arkansas to set aside" Whitmore's death sentence. *Id.* As the Court, after an extensive survey of its prior cases, concluded, "[a] threatened injury must be 'certainly impending' to constitute injury in fact." *Id.* at 158 (citations omitted). *See also O'Shea*, 414 U.S. at 497.

Just last term, the Court revisited in *Lujan* the issue of when an alleged injury is sufficiently imminent to confer standing. There, an environmental advocacy group challenged a regulation promulgated by the Secretary of the Interior under § 7 of the Endangered Species Act of 1973, 87 Stat. 884, 892.

112 S.Ct. at 2135. Plaintiff argued that the challenged regulation violated § 7 because it did not require federal agencies to ensure that actions undertaken in foreign countries did not threaten any endangered or threatened species. *Id.* at 2135. Its claim of injury rested on the affidavits of two members. The first affiant stated that "she traveled to Egypt in 1986 and 'observed the traditional habitat of the endangered Nile crocodile there and intend[ed] to do so again.' " *Id.* at 2138 (citation omitted). The second affiant stated that on a visit to Sri Lanka in 1981, she had observed the habitat of the Asian elephant and leopard and " 'intend[ed] to return to Sri Lanka in the future and hope[d] to be more fortunate in spotting at least the endangered elephant and leopard.' " *Id.* (citation omitted).

The Court held that these affidavits "plainly contain[ed] no facts . . . showing how damage to the species will produce 'imminent' injury." *Id.* As the Court reasoned, the affiants' " 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id.*

Petitioner's complaint suffers from the same fatal defect. Petitioner points to no situation in which any of its members sought and was denied a contract on account of race. Moreover, petitioner does not point to any instance in which the city's officials stated their intention to set aside any contract which would deprive a member of a bidding opportunity within that member's particular trade. Given the discretion which Jacksonville's ordinance vested in the city's officials to decide which, if any, contracts were to be set aside in a given year, as well as petitioner's total failure to identify a single instance in which one of its members had been or would be deprived of a bidding opportunity, petitioner's complaint fails to allege the " 'actual or imminent' injury that [the Court's] cases require." *Lujan*, 112 S.Ct. at 2138. *See also Whitmore*, 495 U.S. at 158 ("Allegations of possible future injury do not satisfy the requirements of Art. III."). The Court's longstanding precedents thus require that it decline petitioner's invitation to enter " 'into the area of speculation and conjecture' . . . and [go] beyond the bounds of [its] jurisdiction." *Id.*

3. *Because Petitioner Has Not Demonstrated Injury in Fact in Either the Qualitative or Temporal Sense, It Must Be Denied Standing*

In sum, petitioner's complaint in this case does not allege a concrete injury in either the qualitative or temporal sense. Petitioner does not allege a concrete past injury and its allegation of future injury rests on nothing more than the bald assertion that some unidentified members might not be awarded future unidentified contracts in the entirely speculative event that such contracts are set aside in the future. Such assertions cannot be sufficient to challenge Jacksonville's ordinance, particularly in the absence of any allegation that this program has ever been used to deny any contractor an equal opportunity to bid on a particular contract. It was, of course, petitioner's burden to make such allegations at the pleading stage. *Lujan*, 112 S.Ct. at 2136.

Amici do not suggest that, in order to establish its standing, petitioner is required to show that one of its members would have successfully bid on a particular contract. We do suggest, however, that ordinarily, the Court's precedents require a plaintiff challenging

a set-aside program to plead and prove that one of its members was qualified to bid on a particular contract and either bid or would have bid but for the set-aside program. Where, as here, that challenge arises in the context of a broad-based program susceptible to discretionary waivers and the like, the identification of a particular contract set aside within a contractor's particular trade is necessary to demonstrate injury in fact. Such a demonstration would satisfy the qualitative aspect of injury in fact by providing a concrete context within which to test the legal interest, as well as the temporal aspect by ensuring that harm is imminent rather than merely hypothetical.[6]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 15, 1993

[6] If, however, a set-aside program was narrowly tailored to operate only within a particular trade, required that a particular number or percentage of contracts be set aside, and allowed for no discretion in its administration, these aspects of injury in fact might be fulfilled by a demonstration that the plaintiff was a qualified contractor within that trade. Such a case is not, of course, presented here.